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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

IN RE JUNIPER NETWORKS, INC.
SECURITIES LITIGATION

Case No. C 06-04327-JW

THE NEW YORK CITY EMPLOYEES'
RETIREMENT SYSTEM, et al.,

Plaintiffs,

v.

LISA C. BERRY,

Defendant.

Case No. C 08-0246-JW

**LISA C. BERRY'S SUPPLEMENTAL
BRIEF IN SUPPORT OF
OPPOSITION TO MOTION TO
COMPEL PRODUCTION OF
DOCUMENTS**

Judge: Hon. Patricia V. Trumbull

1 **I. INTRODUCTION AND BACKGROUND**

2 Plaintiffs' original motions to compel documents from Ms. Berry and KLA-Tencor
3 ("KLA") were heard before this Court on February 9, 2010. Days before, Plaintiffs had agreed to
4 a \$169 million settlement of its claims against all defendants other than Ernst & Young ("E&Y").
5 In light of the pending settlement, Plaintiffs argued at the hearing that the documents sought in
6 their motions were still relevant to their case against E&Y because they are necessary to rebut
7 E&Y's due diligence defense to Plaintiffs' Section 11 claim against E&Y.

8 On February 11, the Court ordered Plaintiffs to submit supplemental briefing "explaining
9 how the documents sought from Defendant Lisa Berry and non-party KLA are relevant to its
10 claim against Defendant Ernst & Young, or to any of Ernst & Young's defenses." Order
11 Soliciting Additional Briefing ("Order"), Doc. No. 531 (Feb. 11, 2010). In response, Plaintiffs
12 offer the following justification for their new theory:

13 One of the many ways in which Lead Plaintiff intends to challenge
14 E&Y's due diligence defense is by showing the widespread
15 knowledge of options backdating among Juniper insiders,
16 specifically Lisa Berry. By demonstrating that Lisa Berry
17 understood the accounting implications and impropriety of
backdating stock options during her prior tenure at KLA and that
she brought and shared this awareness at her next position – as
General Counsel for Juniper – Lead Plaintiff will be able to refute
E&Y's due diligence defense.

18 Lead Plaintiff's Supp. Submission ("Supp.") at 2, Doc. No. 538 (Feb. 23, 2010).

19 The Court should reject Plaintiffs' argument for three independent reasons. First,
20 assuming *arguendo* that documents demonstrating there was "widespread knowledge of options
21 backdating among Juniper insiders" are relevant to E&Y's due diligence, Plaintiffs have (and
22 cannot) explain why evidence of Ms. Berry's supposed understanding of the "accounting
23 implications" or "impropriety" of KLA stock option practices would tend to "refute E&Y's due
24 diligence defense." Second, Plaintiffs have already received voluminous discovery regarding the
25 options process *at Juniper* and fail to make any specific showing as to why they need *any* more
26 documents on this issue, much less documents related to the options granting process or related
27 accounting *at KLA*, which have no conceivable relevance to E&Y's due diligence defense for
28 Juniper related statements. Finally, Plaintiffs' proffered legal grounds for discovery misstates the

1 law regarding E&Y's due diligence defense by conflating the issue of the scienter of the party
 2 asserting the defense with the scienter of a third party.

3 Plaintiffs have failed to satisfy the Court's request to explain how the documents sought
 4 from Ms. Berry and KLA are relevant to E&Y's due diligence, and their motion to compel should
 5 be rejected.

6 **II. ARGUMENT**

7 **A. Plaintiffs Seek KLA Documents That Are Irrelevant to E&Y's Due Diligence**

8 Plaintiffs assert that documents relating to Ms. Berry's accounting knowledge while
 9 General Counsel at KLA, seven years before the filing of the registration statement underlying
 10 their Section 11 claim, can be used to rebut E&Y's due diligence defense. In short, their
 11 reasoning is that Ms. Berry's knowledge of the "accounting and legal ramifications" of
 12 backdating *at KLA* means that E&Y should have discovered purported accounting irregularities *at*
 13 *Juniper*. Lubens Decl. Ex. A, Feb. 9, 2010 Oral Argument Transcript ("Transcript") at 5 ("by
 14 targeting knowledge of Ms. Berry's backdating while she was at KLA, that will have an impact
 15 on Ernst & Young's due diligence [at Juniper]"). As explained below, this argument is based on
 16 a misunderstanding of the due diligence defense and should be rejected.

17 Section 11(b) of the Securities Act provides an affirmative defense to liability for a false
 18 and misleading registration statement if the defendant can prove that it "had, after reasonable
 19 investigation, reasonable ground to believe and did believe, at the times such part of the
 20 registration statement became effective, that the statements therein were true." 15 U.S.C. §
 21 77k(b)(3)(b)(i). *See also In re WorldCom, Inc., Sec. Litig.*, 346 F. Supp. 2d 628, 663 n.41
 22 (S.D.N.Y. 2004). In order to sustain its burden of proof with respect to the "due diligence"
 23 defense, E&Y must demonstrate that it conducted a reasonable investigation into Juniper's stock
 24 option practices and that, based on that investigation, it reasonably believed that such practices
 25 were not misstated or improperly accounted for in the March 2004 Juniper registration statement.

26 Accordingly, the only relevant inquiry here is whether E&Y made a reasonable attempt to
 27 elicit information about how Juniper's options pricing practices worked. Whether those familiar
 28 with its workings understood the accounting implications of those practices has no bearing on the

1 reasonableness of E&Y's investigation or E&Y's scienter. Ms. Berry was not an accountant or
 2 auditor. E&Y filled that role for Juniper and was tasked with understanding the accounting
 3 implications of the stock option practices. Indeed, even at the February 9 hearing on these
 4 Motions, Plaintiffs acknowledged that what they really need to rebut due diligence is Ms. Berry's
 5 knowledge of the *process* at Juniper, not the accounting at KLA: "[Ms. Berry] was the General
 6 Counsel intimately involved in the options process ... So it was part [of] Ernst & Young's due
 7 diligence as the auditors that they should have been making inquiries of Lisa Berry ..."
 8 Transcript at 14; *see also id.* at 70 (requesting additional time to depose Leilani Eames, because
 9 "Ms. Eames's knowledge about the backdating and the option process ... how could [E&Y] not
 10 discover this that Mr. Kriens knew or this that Ms. Eames did? That directly relates to E&Y's
 11 due diligence defense.").

12 Plaintiffs cite two cases for the proposition that "facts supporting scienter of Berry and
 13 other individuals are relevant to negate E&Y's due diligence defense." Supp. at 4. However,
 14 neither of these cases supports any such proposition. In *In re Livent, Inc. Noteholders Sec. Litig.*,
 15 the court determined that two outside director defendants were precluded from asserting a due
 16 diligence defense because the defendants themselves had knowledge of the purportedly
 17 misleading transactions. 355 F. Supp. 2d 722, 734 (S.D.N.Y. 2005). In *In re Int'l Rectifier Sec.*
 18 *Litig.* the court similarly held that it was the scienter of the defendants asserting the due diligence
 19 defense that was relevant. 1997 WL 539600, at *12 (C.D. Cal. Mar. 31, 1997). In short, in the
 20 context of a due diligence defense, the scienter of *the party asserting the defense* is at issue, *not*
 21 the scienter of a third party.¹

22 While Juniper documents concerning executive scienter are irrelevant, Plaintiffs' request
 23 for documents from KLA – a company that E&Y did not even audit – is almost farfetched.
 24 Plaintiffs could only conceivably need access to KLA documents for evidence of two things: Ms.
 25 Berry's scienter or KLA's stock option process. Neither type of evidence is relevant to Plaintiffs'

26 ¹ It is worth noting that Ms. Berry is now a third party to the pending litigation between Plaintiffs
 27 and E&Y in which Juniper's March 2004 Registration Statement and E&Y's auditing diligence is
 28 at issue. Once the \$169 million settlement is finalized and approved, Ms. Berry will become a
 third party to any remaining litigation. A hearing for preliminary approval of the pending
 settlement is scheduled for March 29, 2010 before Judge Ware.

claim against E&Y, which concerns a registration statement filed by Juniper months after Ms. Berry's departure from the company and seven years after she was employed at KLA. Plaintiffs therefore cannot justify discovery as to KLA based on E&Y's due diligence.

B. Discovery in the *Juniper* Action Was More Than Adequate to Uncover Documents Related to the Only Remaining Claim in this Case

Plaintiffs essentially concede that they have already obtained the information they need to rebut E&Y's due diligence defense from discovery conducted in the *Juniper* Action. According to Plaintiffs, the "1999 Berry Memo," quoted in its entirety in their supplemental brief, demonstrates that Ms. Berry understood the stock options pricing process at Juniper. Supp. at 3-4. If E&Y were to have made the "correct inquiries" and "had conversations with Ms. Berry" about this process, according to Plaintiffs, E&Y would have learned that "Ms. Berry had actual knowledge of backdating" and that E&Y "should have discovered that." Transcript at 13. Even if Plaintiffs could somehow demonstrate that Ms. Berry's accounting knowledge is relevant or necessary to ascertaining whether E&Y made the "correct inquiries" of Ms. Berry (which they have not, as explained in detail above), Plaintiffs still bear the burden of explaining why they need additional discovery when they appear to believe they already have many such documents.

Discovery in the *Juniper* Action has provided Plaintiffs with voluminous evidence regarding the options process at Juniper. Plaintiffs have had the benefit of over a year of discovery from the Company, the individual Juniper defendants, former Juniper employees, and E&Y. During that time Plaintiffs have taken 28 depositions and received millions of pages of documents from defendants. Taking Plaintiffs' own theory of relevance at face value, they have everything they need to rebut E&Y's due diligence defense. Plaintiffs have failed to show that documents related to Ms. Berry's scienter are relevant to E&Y's due diligence and justify their request for KLA documents.

III. CONCLUSION

For the reasons stated above, Plaintiffs' Motions should be denied.

1 Dated: March 9, 2010

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